

## CHAPTER 110

### RETAIL FRANCHISING ACT RULES

#### **21 VAC 5-110-65. Escrow and deferral.**

A. Escrow requirement. The commission may require a franchisor to escrow franchise fees and other payments made by a franchisee to the franchisor until the franchisor's pre-opening obligations under the franchise agreement have been satisfied. The commission may require escrow at any time after the submission of a registration or renewal application and upon a finding that the grounds enumerated in clause (i) of subdivision A 2 of § 13.1-562 of the Act as provided in Chapter 668 of the 2007 Acts of Assembly exist.

B. Depository. Funds subject to an escrow condition shall be placed in a separate trust account with a national bank or a state chartered bank or trust company, transacting business in the Commonwealth of Virginia.

C. Compliance with escrow requirement. The franchisor shall file with the commission the following to comply with the commission's escrow requirement:

1. An original, fully executed copy of the Escrow Agreement, Form K;
2. A written consent from the depository agreeing to operate the escrow account under this regulation;
3. The name and address of the depository and the account number of the escrow account;
4. The name, address, telephone number and email address of an individual or individuals at the depository who may be contacted by the commission regarding the escrow account; and
5. An amended franchise application reflecting, in Item 5 of the offering circular or in a Virginia Addendum to the offering circular, that the commission has imposed the escrow

requirement and the material terms of that escrow condition, including the name of the depository.

D. Operation of escrow account. After the commission imposes an escrow requirement upon the franchisor, the franchisor shall:

1. Make franchisee checks for franchise fees or other payments for the franchisor payable to the depository; and
2. Deposit with the depository, within two business days of the receipt, the funds described in subdivision 1 of this subsection;

Deposits made to the depository shall remain escrowed until the commission authorizes the release of the funds.

E. Release of escrowed funds.

1. A franchisor may apply to the commission for the release of escrowed funds together with any interest earned.
2. A franchisor's application to the commission to authorize the release of escrowed funds to the franchisor shall be in writing, verified by an authorized officer of the franchisor and shall contain:
  - a. The franchisor's statement that all proceeds from the grant of franchises have been placed with the depository in accordance with the terms and conditions of the escrow requirement;
  - b. The depository's statement, signed by an appropriate officer, setting forth the aggregate amount of escrowed funds deposited with the depository and the franchisor's account number with the depository;

- c. A list of the names and addresses of each franchisee and the amount held in the escrow account for the account of each franchisee;
- d. The amount of funds sought to be released;
- e. A written certification from the franchisee stating the amount of funds to be released that acknowledges that the franchisor has completely performed its pre-opening obligations under the franchise agreement, including providing real estate, improvements, equipment, inventory, training, or other items as required by the franchise agreement; and
- f. Other information the commission may reasonably require.

3. If the commission finds that the franchisor has fulfilled its obligations under the franchise agreement for a specified franchisee, the commission shall authorize the depository to release to the franchisor the amount held in escrow for the account of the applicable franchisee.

F. Removal of escrow requirement. The commission may remove the escrow requirement at any time, if:

- 1. The franchisor agrees to defer franchise fees and other initial payments; or
- 2. Based upon new information, the commission finds that the escrow requirement is no longer necessary and appropriate for the protection of prospective franchisees.

G. Deferral of fees in place of escrow requirement.

- 1. In lieu of an escrow requirement, the commission may, under appropriate circumstances, accept a franchisor's agreement to defer franchise fees and other initial payments owed by franchisees to the franchisor until the franchisor has completed its pre-opening obligations under the franchise agreement.

2. The franchisor's agreement to defer franchise fees shall be reflected in Item 5 of the offering circular or in a Virginia Addendum to the offering circular.

**21 VAC 5-110-75. Exemptions.**

Any offer or grant of a franchise in a transaction that meets the requirements of this section is exempt from the registration requirement of § 13.1-560 of the Act.

1. Sale or transfer by existing franchisee. The sale or transfer of a franchise by a franchisee who is not an affiliate of the franchisor for the franchisee's own account is exempt if:

- a. The franchisee's entire franchise is sold or transferred and the sale or transfer is not effected by or through the franchisor.
- b. The sale or transfer is not effected by or through a franchisor merely because a franchisor has a right to approve or disapprove the sale or transfer or requires payment of a reasonable transfer fee.

2. Offers and grants to existing franchisees. The offer or grant of an additional franchise to an existing franchisee of the franchisor for the franchisee's own account is exempt if the franchise being sold is substantially the same as the franchise that the franchisee has operated for at least two years at the time of the offer or grant of the franchise, provided the prior sale to the franchisee was pursuant to a franchise offering that was registered or exempt pursuant to the requirements of the Act.

3. Seasoned franchisor.

a. The offer or grant of a franchise by a franchisor is exempt if:

- (1) The franchisor has a net equity, according to its most recently audited financial statements, of not less than \$15,000,000 on a consolidated basis, or \$1,000,000 on an

unaudited basis and is at least 80% owned by a corporation or entity that has a net equity, on a consolidated basis, according to its most recently audited financial statements, of not less than \$15,000,000, and the 80% owner guarantees the performance of the franchisor's obligations; and

(2) The franchisor or any 80% owner of the franchisor or the franchisor's predecessor, or any combination thereof, has had at least 25 franchisees conducting the same franchise business to be offered or granted for the entire five-year period immediately preceding the offer or grant.

b. The exemption set forth in subdivision 3 of this section may be claimed only if the franchisor:

(1) Files a Form H Notice of Claim of Exemption and other material as set forth in subdivision 6 of this section no later than 10 business days before the offer or grant of any franchise; and

(2) Submits financial statements demonstrating compliance with the conditions set forth in subdivision 3 a (1) of this section.

c. An initial exemption filing and any renewal filing shall expire after a period of one year.

The franchisor shall file for a renewal by making an exemption filing if it intends to offer or grant franchises for any additional period annually, at least 10 business days before the expiration of the previously filed Notice of Claim of Exemption.

4. Institutional franchisee.

a. The offer or grant of a franchise to a bank, savings bank, savings and loan association, trust company, insurance company, investment company, or other financial institution, or to a broker-dealer is exempt when the:

(1) Purchaser is acting for itself or in a fiduciary capacity; and

(2) Franchise is not being purchased for the purpose of resale to an individual not exempt under this regulation.

b. The exemption set forth in subdivision 4 a of this section may be claimed only if the franchisor files an initial filing Form H, Notice of Claim of Exemption, and other material as set forth in subdivision 6 a of this section, at least 10 business days before each offer or grant of each franchise.

5. Disclosure requirements.

a. If a franchisor relies upon any of the exemptions set forth in subdivision 2, 3 or 4 of this section, the franchisor shall provide an offering circular complying with 21 VAC 5-110-90, or Federal Trade Commission (FTC) disclosure document pursuant to 16 CFR Part 436, together with all proposed agreements relating to the grant of the franchise to a prospective franchisee 14 calendar days before the signing of the agreement or the payment of any consideration.

b. Franchisors filing a claim of exemption under subdivisions 3 or 4 of this section shall include a self-addressed stamped envelope by which the commission may return to the franchisor a confirmation of receipt of the filing and the exemption file number assigned. Correspondence shall refer to the assigned file number in all subsequent related filings and correspondence with the commission.

6. Filing requirements for exemptions set forth in subdivisions 3 and 4 of this section.

a. Initial exemption filing.

- (1) The initial exemption period shall expire after a period of one year.
- (2) Franchisor files an application for exemption of a franchise by filing with the commission no later than 10 business days before the offer or grant of any franchise, the following completed forms and other material:
  - (a) Notice of Claim of Exemption, Form H;
  - (b) Uniform Consent to Service of Process, Form D;
  - (c) If the applicant is a corporation or partnership, an authorizing resolution is required if the application is verified by a person other than applicant's officer or general partner;
  - (d) Uniform Franchise Offering Circular or FTC disclosure document pursuant to 16 CFR Part 436;
  - (e) Files an undertaking by which it agrees to supply any additional information the commission may reasonably request; and
  - (f) Application fee of \$500 (payable to the Treasurer of Virginia).

b. Amendment to exemption filing.

- (1) Upon the occurrence of a material change, the franchisor shall amend the effective exemption filed at the commission.
- (2) An application to amend a franchise exemption is made by submitting the following completed forms and other material:
  - (a) Notice of Claim of Exemption, Form H;

(b) One clean copy of the amended Uniform Franchise Offering Circular or FTC disclosure document pursuant to 16 CFR Part 436; and

(c) Application fee of \$100 (payable to the Treasurer of Virginia).

c. Renewal exemption filing.

(1) A franchise exemption expires at midnight on the annual exemption effective date. An application to renew the franchise exemption shall be filed 10 days prior to the expiration date in order to prevent a lapse of exemption under the Act.

(2) An application for renewal of a franchise exemption is made by submitting the following completed forms and other material:

(a) Notice of Claim of Exemption, Form H;

(b) One clean copy of the Uniform Franchise Offering Circular or FTC disclosure document pursuant to 16 CFR Part 436; and

(c) Application fee of \$250 (payable to the Treasurer of Virginia).

**NOTICE:** The forms used in administering 21 VAC 5-110, Retail Franchising Act Rules, are listed below. Any amended or added forms are reflected in the listing and are published following the listing.

## FORMS

FORM A-"Facing Page" -Uniform Franchise Registration Application (eff. 7/1/95).

FORM B-Supplemental Information (eff. 7/1/95).

FORM C-Certification (rev. 7/99).

FORM D-Uniform Consent to Service of Process (rev. 7/99).



FORM E-Affidavit of Compliance - Franchise Amendment/Renewal (rev. 7/99).

FORM F-Guarantee of Performance (rev. 7/99).

FORM G-Franchisor's Surety Bond (rev. 7/99).

FORM H-Notice of Claim of Exemption (eff. 7/07).

FORM K-Escrow Agreement (eff. 7/07).

Form H  
7/07

NOTICE OF CLAIM OF EXEMPTION

DATE \_\_\_\_\_

File # \_\_\_\_\_

FEE: \_\_\_\_\_

APPLICATION FOR (Check only one):

APPLICATION TYPE (Check only one):

\_\_\_\_\_ INITIAL FILING

\_\_\_\_\_ SEASONED FRANCHISOR

\_\_\_\_\_ RENEWAL FILING

\_\_\_\_\_ AMENDMENT FILING

\_\_\_\_\_ INSTITUTIONAL FRANCHISEE

1. Name of Franchisor:

Name of Franchise:

2. Franchisor's principal business address:

3. Name, address and telephone number of sub franchisors, if any, for this state:

4. Name, address, telephone number, and e-mail of person to whom communications regarding this application should be directed:

*The undersigned Franchisor represents that it shall provide prospective purchasers in the Commonwealth of Virginia an offering circular that complies with 21 VAC 5-110-90, or an FTC disclosure document (16 CFR Part 436) 14 calendar days prior to the signing of an agreement or receipt of consideration.*

Form H  
7/07

*In addition, if claiming the Seasoned Franchisor exemption, the undersigned represents that:*

*(1) (Check the applicable box)*

*( ) The Franchisor has a net equity on a consolidated basis, according to its most recent audited financial statement, of not less than \$15,000,000;*

*Or*

*( ) The Franchisor has a net equity of \$1,000,000 according to its most recent unaudited financial statement and is at least 80% owned by a corporation or other entity which has a net equity on a consolidated basis, according to its most recent audited financial statement, of not less than \$15,000,000 and the owner guarantees the performance of the Franchisor's obligations;*

*(2) The Franchisor or any 80% owner of the franchisor or the franchisor's predecessor, or any combination thereof, has had at least 25 franchisees conducting the same franchise business to be offered or granted for the entire five-year period immediately preceding the offer or sale.*

Attach a copy of the *Franchisor's* most recent Uniform Franchise Offering Circular or an FTC disclosure document (16 CFR Part 436 and, if applicable, financial statements of any corporation the *Franchisor* is relying on to qualify for the exemption.

This claim of exemption will be effective for a period of 12 months from the date it is granted. A renewal notice shall be filed 10 business days prior to the expiration of the effective period.

Certified this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_

By \_\_\_\_\_  
Signature

\_\_\_\_\_  
Type or Print Name and Title

For \_\_\_\_\_  
Type or Print Name of Franchisor

Form K  
7/1/07

## ESCROW AGREEMENT

This Escrow Agreement, made this \_\_\_\_ day of \_\_\_\_\_,  
\_\_\_\_\_, by \_\_\_\_\_ organized under the laws of  
the State of \_\_\_\_\_, (hereinafter referred to as "Franchisor") and  
\_\_\_\_\_ (hereinafter referred to as "Bank").

WHEREAS, the Franchisor desires to offer and sell franchises in the Commonwealth of Virginia,  
and

WHEREAS, it is the discretion of the Virginia State Corporation Commission (the  
"Commission") as Administrator of the Virginia Retail Franchising Act, to require an escrow of franchise  
fees and other fees paid by the franchisee to the Franchisor, and

WHEREAS, in order to conform to the procedures for arranging an escrow account, the  
Franchisor desires to enter into an Escrow Agreement with the Bank, pursuant to which franchise fees and  
other fees are to be held in escrow for the purpose of complying with the Virginia Retail Franchising Act.

NOW, THEREFORE, with the foregoing recitals hereinafter incorporated by reference and made  
a part hereof, it is agreed as follows:

1. The Franchisor shall, until release of escrowed funds as hereinafter provided, deposit with the  
Bank, all monies obtained from each franchisee that contracts to operate the franchised business within  
the Commonwealth of Virginia.

2. All funds delivered by the Franchisor to the Bank will be placed in a separate account  
designated substantially as follows: \_\_\_\_\_

3. The Bank shall pay out funds, plus interest if any, from the Escrow Account only upon the  
occurrence of one of the following conditions:

a. A letter from the President or Secretary of the Franchisor directing the Bank to pay out such  
funds to \_\_\_\_\_ accompanied with a written notice from  
the Commission stating that it takes no exception to the release of such funds to  
\_\_\_\_\_.

b. Upon written notice from the Commission, the Bank shall return the deposited franchise  
fees and other fees to a specific franchisee.

c. The Bank shall pay funds into court or disburse or deliver them in accordance with any  
order of any court of competent jurisdiction.

4. The Franchisor will supply the Bank with the name and address of each franchisee, together  
with the amount of the deposit that represents each franchisee's franchise fees and other fees, and the  
Bank will retain records containing the same information.

5. Any funds deposited in the Escrow Account pursuant to this Escrow Agreement shall be invested and kept invested by the Bank in obligations of the United States, or a savings account or savings accounts of the Bank, or money market funds of or available to the Bank and to which the Bank or an affiliate is investment advisor or provides other services and receives reasonable compensation for such services, provided the money market funds are rated AAAM by Standard and Poor's and Aaa by Moody's Investor Services, or U.S. Treasury Bills, Notes or Bonds until such funds are to be disbursed as provided in Paragraph 3 hereof. All interest received and any increment shall be added to the funds so deposited in the Escrow Account and shall be distributed as provided in Paragraph 3 hereof.

6. The Commission may inspect the records of the Bank, insofar as they relate to this Escrow Agreement, for the purpose of determining compliance with and conformance to the provisions of this Escrow Agreement. At the Commission's discretion, statements indicating the status of escrow shall be furnished by the Bank to the Commission.

7. The Franchisor shall pay to the Bank reasonable compensation for expenses incurred and services rendered by the Bank under this Escrow Agreement.

8. The Bank shall have no duty to determine the propriety of any deposit or disbursement of funds. Additionally, the Bank shall have no duty to the Franchisor, the Commission, any franchisee or any other party except as expressly stated in this Escrow Agreement. The Franchisor does hereby indemnify the Bank from any and all costs, claims and expenses, including attorneys' fees, which may be incurred by or which may accrue to the Bank relating to the opening or maintenance of any account established under this Escrow Agreement.

9. All proceeds deposited pursuant to this Escrow Agreement shall not be subject to any liens or charges by the Bank, or judgments or creditor's claims against the Franchisor.

10. The Franchisor shall give each franchisee a copy of this Escrow Agreement prior to collecting any funds from that franchisee.

11. The Bank's duties under this Escrow Agreement shall terminate upon final distribution of all monies deposited as provided hereunder.

12. This Escrow Agreement is governed by the laws of the Commonwealth of Virginia.

Form K  
7/1/07

IN WITNESS WHEREOF, each party has caused this Escrow Agreement to be signed and executed, and its corporate seal hereto affixed, in its name by its proper and fully authorized officer or officers on the day and year first above written.

ATTEST:

NAME AND ADDRESS OF BANK

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
(Bank's Secretary)

By: \_\_\_\_\_

Title: \_\_\_\_\_

NAME AND ADDRESS OF FRANCHISOR

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
(Franchisor's Secretary)

By: \_\_\_\_\_

Title: \_\_\_\_\_

Form K  
7/1/07

### **ESCROW INSTRUCTION SHEET**

A. The Franchisor shall return a fully executed copy of the escrow agreement, with original signatures, to the Division of Securities and Retail Franchising before its application will be made effective.

B. The Franchisor shall also provide to the Division in writing, the name of the bank, the name, address and telephone number of the person(s) at the bank who may be contacted for information regarding the escrow account, and the account number. Any changes to this information shall be immediately provided to the Division.

C. Funds in the escrow account will only be released upon completion by the Franchisor of its pre-opening obligations to the Franchisee. Requests for the release of escrowed funds shall be in writing and shall be sent to the Division. The Franchisor shall state in the request the exact amount of the funds to be released. The Division shall receive written certification from the Franchisee whose funds are to be released to the Franchisor. The certification shall state the amount of funds to be released, and that the Franchisor's pre-opening obligations to the Franchisee have been satisfied.

D. Please refer to 21 VAC 5-110-65 of the Virginia Administrative Code, entitled "Escrow and Deferral", for additional information on the operation of escrow accounts.